Manitoba

GOVERNMENT OF MANITOBA

RESPONSE TO THE REVISION OF CANADA'S COPYRIGHT ACT

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and Recreation

Manitoba

The Province of Manitoba like the Federal Government, recognizes as an urgent priority, the need to strengthen and expand copyright protection. The Report of the Federal Cultural Review Committee observed that copyright legislation, by itself, would not solve either the economic or social problems of all authors - to which we would add: all creators and developers. Their value to society, the Report noted, "must be measured and paid for through means outside the realm of copyright". At the same time, it is incumbent upon Government to respond to the enormous growth and development of Canada's cultural sector, particularly over the past 25 years, and the more recent advancement in cultural technological capabilities, all of which create demands for new mechanisms for the protection of our artists, creators, developers and technological capacities as to the right to create, perform, develop and hold capacities for use. Correspondingly, the needs of the users of intellectual property have changed dramatically and these needs too, must be met. It is in this context that the Government of Manitoba joins with the Government of Canada in addressing the issues and concerns related to the revision of Canada's Copyright Act, now some 62 years old, as a means of assuring the continuing growth, vigor and well-being of our cultural and intellectual assets and potential.

AN AFFIRMATION OF BASIC PREMISE

The Government of Manitoba strongly affirms and commends the Sub-Committee's first recommendation:

1. The Copyright Act should be expanded to include new property rights which reflect modern forms of creative activity and the various forms of communicating the fruits of that activity.

The Government of Manitoba wholeheartedly supports this recommendation and its objectives, although Manitoba wishes to have considered prior to final passage of any legislation, some particularized concerns originating in specific recommendations made to further this first principle.

THE CROWN IN THE RIGHT OF CANADA AND EVERY PROVINCE

The recommendations of continuing concern to the Government of Manitoba are the Sub-Committee's recommendations numbers 9-13 which suggest that the Crown in the right of Canada and in the right of every province should be subject to the provisions of the Copyright Act. We note that the federal

government in February 1986 responded to the Sub-Committee recommendation in this area by stating:

> The government feels that recommendations 11 and 12 raise a number of issues that ought to be examined in greater depth. A number of categories of works produced by the government and its agencies, other than those identified by the Sub-Committee, might require protection.

Morever, the implications of the noted recommendations, (9-13) with respect to the production of publications by departments of government for which fees are charged, the issue of control over the use of these publications and the limitation of copyright protection to works of crown agencies by definition "the purpose of which is to entertain rather than assist in policy debate and evaluation", are considered to be critical areas calling for continued, in-depth examination. The Government of Manitoba suggests that in this regard as well, consideration be given to providing governments the flexibility to define copyright or public domain limitations (i.e. where it is desirable or in the public interest that ownership and copyright be retained by the contractor) as an included exemption for contracted works; and to the protection of the mathematics and procedural processes used in deriving statistics or statistical work. The federal government's position that further study should be effected prior to legislative action is therefore, supported vigorously by the Government of Manitoba.

THE RIGHTS OF CORPORATIONS AND COOPERATIVES

The set of Sub-Committee recommendations relating to the rights of corporations and cooperatives to hold and exercise full rights and rights of first ownership vested with the employer, warrant further consideration. The Government of Manitoba takes the position that clarification of and definition of the term "employee" is necessary, as is a definite clarification of "in the course of employment", since intellectual and developmental work by individuals is often done in their own private time and is rightfully theirs, unless using knowledge or technologies exploited by their employer. Further, although the Sub-Committee is silent on the issue of unpublished corporate records, this is an area which the Government of Manitoba would wish to see addressed.

WRITING AND PUBLISHING

With respect to the recommendations relating to Writing and Publishing, the Government of Manitoba accepts these recommendations in principle. In particular, the Government of Manitoba affirms the position of the Sub-Committee that importation protection is essential to the survival of Canada's cultural industries. As importation barriers must be accompanied by mechanisms of enforcement, the retention of s.27 of the current Act is seen as being desirable.

a) Payment for Public Use

The Government of Manitoba strongly supports the principle that payment for public use is a valid concern for authors and that a scheme of rightful payment should be developed outside of the Copyright Act.

b) Reprographic Reproduction

The Government of Manitoba moreover, concurs with Sub-Committee's recommendation (24) not to introduce a specific right of reprographic reproduction for libraries. Concurrently, while the Government of Manitoba agrees that libraries should be required to take such reasonable actions as would ensure that patrons using photocopiers are made aware of copyright restrictions (i.e. by way of prominently posting appropriate notices) we believe responsibility for compliance to applicable restrictions should be vested in the consumer. Furthermore, in consideration of Inter-library transactions, which occur on both a cross-Canada and international basis and require the making of photocopies for patrons in other jurisdictions, the Government of Manitoba supports the position of the Canadian Library Association which proposes a clear provision within the new copyright act for the defence of "fair dealing" by agents or intermediaries, such as library staff who copy work on "behalf of patrons", where that defence is available to the patron.

VISUAL ARTS

a) Droite du Suite

The Sub-Committee has also made recommendations relating to issues in the Visual Arts. The Sub-Committee has recognized that there is a necessity for a major study relating to the possible introduction of Droite de Suite, the right of a creator to share in the profits of the resale of an original artistic work, and to control exhibition and collect royalties. The Government of Manitoba has concerns that, should such a right be introduced, Canada would be obliged to extend protection to all other countries adhering to the Berne and UCC convention, without reciprocal rights, which would increase Canada's copyright deficit. Manitoba has taken the position that artists should be encouraged to negotiate contracts which govern resale profits and other factors, and that government should organize an educational scheme to inform artists about contractual relationships. Therefore, the Government of Manitoba would encourage and support further study in this area.

b) Copyright in Photographs

The Government of Manitoba has reservations with respect to the Sub-Committee's recommendations 36 and 37, relating to copyright in photographs. These recommendations, if implemented, would result in a good many archival photographs being newly governed by copyright and therefore less accessible to the public. Manitoba therefore would recommend that the term of copyright in photographs be for the life of the artist plus fifty years, with the exception of archival photos, for which it is often impossible to identify the photographer. (In this case, it is recommended that the term be 50 years from the making of the photograph).

AUDIO VISUAL WORKS

The Sub-Committee recommendations relating to Audio Visual Works suggest that the new Act, in defining "publication", should take into account the various methods of making a work available to the public other than by issuance of copies of that work. The Government of Manitoba affirms and supports the need for greater clarification and definition.

The Government of Manitoba believes that many of the difficulties encountered with the existing legislation are related to the interpretation of current technical capabilities within its framework. Because of advancements in technologies it is clearly necessary that revisions to the Copyright Act be written in a manner that does not lend itself to future technical obsolescence, or the need for frequent revision. The Government of Manitoba suggests, that referring to generic technical capabilities (e.g. audio and visual reproduction, communications), as opposed to current technical devices that accomplish these capabilities (e.g. tape recorders, record players, compact disc players, photocopiers, telephony), would serve to meet these objectives. In keeping with this position, the Government of Manitoba agrees unequivocally with the Sub-Committee, that changing technologies necessitate revisions to the Copyright Act which would provide protection for information storage retrieval systems; as well as with its recommendation respective of a broad use of language in the new Act, which would not limit the application of copyright in unforeseen circumstances.

COMPUTERS

With respect to those recommendations of the Sub-Committee related to Computers, the Government of Manitoba concurs with the Sub-Committee definition of "fixation", the primary consideration for copyright in the computer media, as a term encompassing all means of capturing a work so long as that means has a degree of permanence, as well as with the recommendation that new technologies (such as computer software) be protected, so long as such protection as is provided, is not so excessive as to stifle, rather than enhance business growth. Further to the issue of computers, the Government of Manitoba suggests, that Recommendation 59: provision of "an exception to the right of reproduction to permit the making of a back-up copy", should only be allowed with the consent of the owner. In the matter of the terms of protection to the right of reproduction (60), the Government of Manitoba recommends consideration be given to "five years after cessation of any commercial activity", with a maximum limitation of fifteen years (or a similar, less restrictive term of protection), in view of changing technology and the desirability of removing any potential deterrent to technological innovation. And finally, we offer the suggestion that consideration be given to extending copyright to any computer program, or data, while being transmitted through data communication lines between points.

FAIR DEALING

While the Government of Manitoba is generally supportive of Sub-Committees' recommendations with respect to "fair dealing", we differ with Sub-Committee insofar as Manitoba favours the use of the term "fair use". Those reservations held by the Government of Manitoba arise primarily from the difficulties encountered by archivists and librarians, who are most concerned with questions of the dissemination of information and research materials, in working within a legislated framework which lacks a statutory definition of the term "fair dealing".

a) "Fair Use" and unpublished materials (Archival)

The Government of Manitoba therefore, favours the term "fair use" as representing a broader context within which certain assurances, vis a vis the availability of archival materials and collections for valid academic research, are provided. The Government of Manitoba further favours organizing the term "fair use" into two categories 1) "Fair Use" and unpublished materials in archival collections and 2) "Fair Use" and reprography. With respect to category one, "Fair Use" and unpublished materials in archival collections, the Government of Manitoba would recommend that the new Copyright Act employ the term "fair use" and elaborate upon the terms and conditions of such use, including statutory provisions regarding unpublished materials. (Implied in this comment is a recommendation that copyright should not necessarily be applied to all unpublished materials, since the original author is often deceased and in the case of archival materials, heirs frequently have no knowledge of, or concern for, their ancestor's documents).

b) "Fair Use" Reprography

With respect to "Fair Use" and reprography, the Government of Manitoba takes the position that the term "fair use" be clarified as to its application with regard to the photocopying of selected original documents from various archival collections for research and reference purposes, as to its application for limited copies of unpublished, out of print or otherwise unavailable material from libraries or archives for presentation purposes, and as to its application to the reproduction for a single user, for study or research purposes, of a single copy of one article from an issue of a periodical or less than ten percent of a book. In the latter regard, the Government of Manitoba's position reinforces the understanding in Canada among librarians and other informed users, that certain very limited copying practises fall within the ambit of fair dealing. The Government of Manitoba favours these exemptions under the term "fair use" as research purposes are without profit motive, and without these exemptions, research will be hampered. The necessity for clarification also exists because archivists and librarians are concerned about the possibility of personal liability.

c) Defining "Fair Use"

Recognizing that use of the undefined term "fair use" in the new Copyright Act will present the same problems previously arising with respect to defining the term "fair dealing" and precludes benefit of such precedents as exist relative to some refinement of the phrase "fair dealing" in the case

law, the Government of Manitoba further recommends, that reasonable criteria be established by which to determine if use is fair, as well as a priorized list of factors for consideration of the courts in judging cases. Nothwithstanding the Government of Manitoba's preference for the use of the term "fair use", it welcomes the federal government's intention to grant the benefit of fair dealing to unpublished works deposited with archival or conservation institutions, for research purposes, private or otherwise and supports the federal government's intention to examine the possible impact of Sub-Committee's recommendations on research practises in general.

NEIGHBOURING RIGHTS

a) Sounding Recordings

The Sub-Committee has made numerous recommendations under the heading of Neighbouring Rights. In the area of Sound Recording, the Sub-Committee has recommended that copyright in such endeavours should be assigned to the person(s) principally responsible for making the arrangements, ie the producers. The Government of Manitoba would ask that the new Act clarify the issue of copyright ownership in works which involve the contributions of many different persons.

BROADCASTS

a) Copyright and Retransmissions

In the area of Broadcasting the Sub-Committee has recommended that copyright protection should be extended to cable retransmissions. Considering the statistical data on television watching patterns, and the lack of availability of high demand product (such as drama and variety) which is produced in Canada, this recommendation, if it is incorporated into the Copyright Act, will foster an enormous drain of Canadian copyright funds. This flow of monies will not be limited to the United States - under the Berne convention all foreign nationals adhering to this convention would have to be compensated. However, the largest single recipient of this transfer of funds would be the United States. As the Federal government has agreed in principle with most of the suggestions of the Sub-Committee but has called for a careful definition of the conditions and mechanism for extending the rights of broadcasters, the Government of Manitoba would be supportive of and encourage further study on the issue of retransmission. Manitoba has serious concerns regarding the extension of rights attached to retransmission based on the significant transfer of income which would necessarily flow from Canada to the United States as a result of Canada being a net importer of television programming. The Government of Manitoba notes that foreign sources are largely compensated for Canadian rights by broadcasting stations. The Government of Manitoba favours a mechanism outside copyright, similar to the existing 7% tax on cable services, which would assist in financing Canadian production while preventing loss of royalties to other countries. The Government of Manitoba is supportive of statements made by the former Minister, Hon. Marcel Masse, rejecting copyright liability for local signals.

REQUESTS FOR SPECIAL CONSIDERATION

a) Special Media Materials

The Government of Manitoba notes, that although the Sub-Committee recommends in favour of the production of special media materials without the authorization of the copyright owner, but with payment to be made in accordance with tariffs established by the Copyright Appeal Board, the Government of Canada supports such a recommendation only where there is no accompanying obligation to pay royalties. Addressing first, the general intent of Sub-Committee's recommendation, the Government of Manitoba supports this objective by way of its recommendation that the exemption be extended to benefit all handicapped persons, this to mean the blind, the visually - impaired who utilize large-print materials for example, and the hearing impaired. With respect however, to the federal government's position on the matter of the obligation to pay royalties, the Government of Manitoba reiterates its support for the originating ambition of copyright revision to recognize the contribution of the creator through a copyright legislation which reflects the legal acknowledgement of the exclusive right of the creator, not only to determine the use of a work, but to share in the benefits produced by that work. Consistent with this premise is the right of the creator to self-determination with respect to the donation of those services. The Government of Manitoba therefore, supports in principle the Sub-Committee's recommendation with respect to the application of appropriate users fees and in this regard, recommends that a further review be conducted to suggest a source of funds, perhaps outside the revised copyright legislation (e.g. PPU), to compensate creators for works used.

COLLECTIVES

With respect to procedural mechanism to facilitate the implementation of the proposed copyright legislation, the Sub-Committee has recommended that copyright collectives would prove a useful and effective means to enforce copyright and collect fees and suggested the mandating of such collectives by means of an expansion of the Copyright Appeal Board. If copyright collectives are regulated by the Copyright Appeal Board, they would be shielded from the Combines Investigation Act under the "regulated conduct" exemption, as they would be subject to regulation under validly enacted federal legislation. The Sub-Committee asserted that copyright collectives would allow both copyright owners and users to circumvent administrative difficulties in establishing rights of ownership by having the collectives monitor the use of the works, collect and distribute royalties, and initiate suits where necessary. The Sub-Committee has taken the position that no creator should be compelled to assign rights, wishing thusly to affirm the principle of freedom of contract. The Government of Manitoba also affirms the usefulness and effectiveness of copyright collective as a mechanism to enforce copyright and collect fees. While the Government of Manitoba generally favours the position that would encourage creators to exercise their rights exclusively through such copyright collectives, recognizing the significant limitation this position places upon the freedom of artists to choose whether or not to join copyright collectives and to enforce their own rights under the Copyright Act, we note our support

of Sub-Committee's recommendations 110, 112 and 113 in this regard. Bearing in mind however, the protection of creator rights, Manitoba recommends that consideration be given to providing assistance to creators outside the Act, by way for example, of programmes of education made available to artists which might encompass such subject matter as obtaining competent legal support, negotiating and enforcing their own rights and the matter of continuing rights under the Copyright Act.

COPYRIGHT APPEAL BOARD

With respect to the mandate of the Copyright Appeal Board, the Government of Manitoba suggests that there is a need for guidelines requiring an exhaustive search prior to the issuance of a license by the Board where the copyright owner cannot be found. Clear rules of procedure should be established to allow for the issuance of a non-exclusive license by the Board when satisfied that "reasonable effort" has been made to locate the copyright owner.

EXCEPTIONS

a) Educational Purposes

Recommendations 90 and 91 dealing with exemptions for educational purposes have been given serious consideration by the Government of Manitoba. Since recommendation 91 is consistent with copyright legislation found in most countries and is not generally considered an overly abusive practise, the Government of Manitoba is fully supportive of its intent. Recommendation 90 however, appears to be in contradiction with Sub-Committee's own clearly articulated reasoning that "the needs of education should not override the rights of creators" in that it neglects to clearly define public performance and what it means by the transmission and retransmission of a work within the confines of a single educational institution. The absence of such definition could be interpreted as tacit approval for the acquisition of classroom materials outside the legitimate educational marketplace (e.g. off-air taping of materials which might have been broadcast) and the performance of scripted works in public without benefit to the playwright. The Government of Manitoba is concerned as well, with the restrictive nature of the wording of 90(B), particularly as it would effect the delivery of courses outside the traditional classroom through various forms of distance education. In these circumstances, the student's home, or a centre geographically distinct from the institution offering the course, should be considered part of the educational institution for the duration of the course. The Government of Manitoba recommends that Recommendation 90(a) and (b) receive further study, with particular attention to determining and assigning clearly articulated definitions for each, with consideration for the delivery of courses outside the traditional classroom and in keeping with the overall rights of the creator.

INFRINGEMENTS AND REMEDIES

Several recommendations (132-137), agreed to in principle by the Federal government, address issues pertaining to a definition of what constitutes copyright infringement and the accompanying areas of penalty, protection and procedure. Since the effectiveness of any legislation of this nature is predicated on both a perceived and real enforceability, the Government of Manitoba wishes to emphasize the need, not only to define what constitutes infringement, but to define and detail such penalities as will be attached to infringement(s), as well as those provisions for access to enforcement mechanisms by owners or developers, to prevent abuses of copyright as are (or will be made) available. The Government of Manitoba believes these considerations are fundamental to ensuring the revised Act is effective as an instrument to deter abuse and enforceable where such abuses do occur. Together with the foregoing, the Government of Manitoba recommends that every effort be made to ensure compatibility of the revised Act with the laws of other countries, and that computer-related intellectual property affected by copyright and patent laws are complementary.

CONCLUSIONS

In June 1984 Canada and Manitoba signed a Subsidiary Agreement to the January 1984 Canada-Manitoba ERDA Agreement, which allocates funds to cultural enterprises development in the areas of film, publishing, and recorded music. The Government of Manitoba is therefore pleased to note recommendations included in this report which enhance the rights of creators in the cultural industries or which support the ongoing enforcement of certain rights.

The Government of Manitoba is appreciative of the comprehensive quality of this report. Copyright is one of the more complex and crucial issues facing government and the creative community. As Canadians, we all must acknowledge the need to create a climate where culture can thrive and where our creative talent is encouraged and protected.

Manitoba is hopeful that some of the comments made and issues raised will receive consideration by the Federal Government and the Sub-Committee in the further review and revision of the proposed legislative changes.